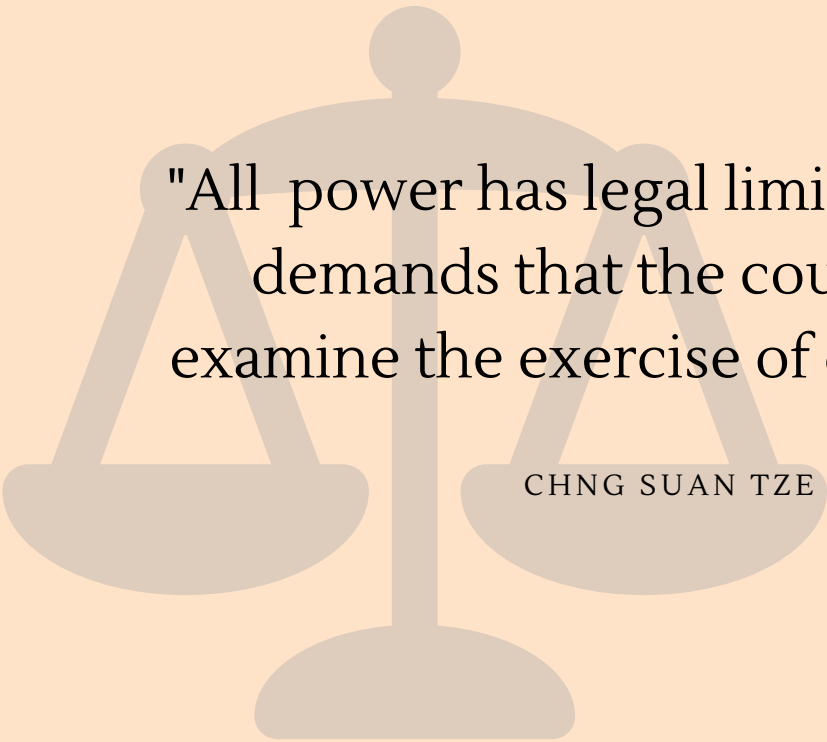




ALL YOU NEED TO KNOW ABOUT

# JUDICIAL REVIEW AND STRATEGIC LITIGATION

A large, light gray watermark of a person holding a scale of justice is centered in the background of the page.

"All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."

CHNG SUAN TZE V MINISTER FOR HOME AFFAIRS

# 1

## WHAT IS JUDICIAL REVIEW?

Judicial review refers to the process by which the judiciary examines the exercise of power by the other branches of government, namely the legislature and the executive.

This guide will give you an overview of how judicial review works and how it can be employed in advocating for social change.

### REFRESHER: THE THREE BRANCHES OF GOVERNMENT

Singapore's political system is modeled after the Westminster system and based on the principle of the **separation of powers**, with 3 separate branches of government to prevent abuse of power:

- The **Legislature**, also known as Parliament, makes the laws of the land and is made up of elected Members of Parliament;
- The **Executive**, which consists of the Cabinet led by the Prime Minister, administers the law;
- The **Judiciary** interprets the law through the Courts.

## TYPES OF REVIEW: WHAT TO SUE?

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### (i) Unconstitutionality

You can apply for judicial review to challenge the validity of a law or policy on the basis that it infringes on your fundamental liberties, such as your right to equality or right to freedom of religion.

For instance, in **Lim Meng Suang v Attorney-General [2014] Court of Appeal**, several gay men launched a constitutional challenge against Section 377A of the Penal Code. They argued that the law infringed on their constitutional rights to personal liberty and equality.

### (ii) Administrative Lapses

You can apply for judicial review to challenge the validity of administrative actions or decisions by a public body. This includes ministries and statutory boards. The action or decision may be invalid because it is beyond the powers of the public body or a violation of procedural fairness.

For instance, you may challenge the police's rejection of your license application to organise a public assembly.



The legal team representing the three gay plaintiffs in the case **Lim Meng Suang v Attorney-General**  
Picture credit: Today Online

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## REMEDIES: SUE FOR WHAT?

You may ask the court for various prerogative orders, which are orders made by the court to another branch of government.

(i) **Mandatory order:** issued by courts to demand that a public body perform a particular action

For instance, in 2012, the parliamentary seat for Hougang SMC became vacant after its MP was expelled from his party. A Hougang resident, Vellama d/o Marie Muthu, applied for judicial review seeking a mandatory order to require the Prime Minister to advise the President to issue a writ of election for Hougang SMC so that a by-election would be held.



Vellama (right) and her lawyer, public interest lawyer, M Ravi  
Picture credit: Asia One

(ii) **Quashing order:** invalidates a previous decision or action made by a public body or statutory authority

An example is the case of **Chan Hiang Leng Colin v Minister for Information and the Arts [1996] Court of Appeal**. A quashing order was sought by Chan and other Jehovah's Witnesses to invalidate a ban imposed by the Minister for Information and the Arts on the importation, sale and distribution of publications by their organisation.

(iii) **Declaratory order:** a pronouncement by the court as to the legal position of parties

In the initial constitutional challenge against Section 377A of the Penal Code, the applicant, Tan Eng Hong, had sought a declaration that the law was unconstitutional. However, it should be noted that a declaratory order does not have any force of law; it depends on whether the other party is willing to act according to the court's declaration. For example, even if the Court of Appeal had declared Section 377A unconstitutional, the law is not repealed until and unless Parliament decides to do so.

(iv) **Habeas corpus:** an order for a person detained by the police or the Internal Security Department to be brought before the court to determine whether his detention is lawful

This phrase, directly translated, means "that you have the body". In **Chng Suan Tze v Minister for Home Affairs [1988] Court of Appeal**, four individuals arrested for allegedly participating in a "Marxist Conspiracy" successfully sought habeas corpus orders from the court and were released from detention.

(v) **Prohibitory order:** prevents a public authority from taking a particular action or making a particular decision

In **Jeyaretnam Kenneth Andrew v Attorney-General [2013] Court of Appeal**, Jeyaretnam had unsuccessfully applied for a prohibitory order to prohibit the Government and the Monetary Authority of Singapore from giving any loan or guarantee to the International Monetary Fund on the basis that it was in breach of Article 144 of the Constitution.

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## LOCUS STANDI: CAN YOU SUE?

The applicant for judicial review must possess the legal capacity to institute proceedings, also known as "locus standi" or "standing". This is a threshold issue that is usually determined before the courts enter into an investigation on the substantive merits of the case.

As set out in **Jeyaretnam Kenneth Andrew v Attorney-General [2013] Court of Appeal**, the applicant must satisfy the following three requirements:

### (i) Susceptibility of Subject Matter of Complaint to Judicial Review

The courts must have jurisdiction to review the matter, which must have some "public element", and the matter complained of cannot be subject to an ouster clause.

### (ii) Test of Real Controversy

There must be a prima facie case of reasonable suspicion that the applicant's constitutional rights have been violated; theoretical violation of, or potential threats to, the applicant's personal rights do not count.

### (iii) Test of Sufficient Interest

The applicant must (a) be directly affected by the violation of a personal right, or (b) demonstrates **special damage**, or sufficient gravity of the breach of a **public right shared in common with other citizens**. This requirement may significantly limit the possibility of public interest litigation.

**DID YOU KNOW?** Unlike other jurisdictions like Canada and India, Singapore does not recognise **public interest standing**. This allows persons who are not directly affected to nevertheless bring a case to court on the basis that they have a genuine interest and there is no other reasonable and effective manner in which the issue may be brought before the court.

## WHAT IS AN OUSTER CLAUSE?

An ouster clause prohibits the court from exercising judicial review over the government's discretionary powers to act.

For example, s 33B(4) Misuse of Drugs Act prohibits the court from reviewing the Public Prosecutor's determination of whether a person had substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities, unless the Public Prosecutor acted "in bad faith or with malice".

However, the court may review executive actions despite an ouster clause when there is procedural unfairness, also known as a breach of fundamental rules of natural justice. This includes the rule against bias and the right to be heard.

## MERITS: WILL YOU WIN?

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The courts generally decide on whether a case succeeds based on a non-exhaustive list of potential considerations, including:

- (i) Extent to which the applicant proves that they have been prejudiced by, or suffered damage, as a result of the unconstitutional law or erroneous administrative action
- (ii) Whether there is sufficient evidence that the State acted unconstitutionally or unlawfully, usually by infringing upon a citizen's constitutional rights
- (iii) Importance of constitutional right, weighed against exceptions provided for in law, and public policy considerations

Constitutional challenges have rarely been successful in Singapore due to judicial self-restraint. According to legal scholars, the judiciary's approach towards constitutional interpretation "reveals deference towards the legislature and the executive, resulting in... a narrow reading of constitutional rights".

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## WHAT IS STRATEGIC LITIGATION?

Strategic litigation, also known as impact litigation, is aimed at bringing a specially chosen case to court so that it will not only change the law but also effect wider social change.

One way social change can happen is through increased media attention on the issue as a result of the litigation. This can lead to greater awareness and interest in the issue you are advocating.

When should you adopt litigation as part of your strategy to engender social change? In a seminal essay, "The Role of Law in Progressive Politics", Harvard law professor and activist Cornel West explained that litigation performs two main roles in a social movement.

Firstly, it codifies successes achieved by earlier activism outside of the courtroom. Secondly, it inspires further action among activists to continue advocating for progress. Strategic litigation therefore cannot be the only way you go about engendering change. It must work in tandem with other tactics of community organising and movement-building.

Strategic litigation can be an effective method to achieve social change but it is often one of the last few steps in the long process. As author-activist Rebecca Solnit wrote, "You may be told that the legal decisions lead the changes, that judges and lawmakers lead the culture in those theaters called courtrooms, but they only ratify change. They are almost never where change begins, only where it ends up, for most changes travel from the edges to the center."

## Case Study 1: Reform of the Mandatory Death Penalty (MDP)

Sometimes, strategic litigation can be effective even if you do not succeed in court. An example is the reform of the MDP. Between 2009 and 2012, human rights lawyer M Ravi had launched multiple constitutional challenges against the impending execution of his client, 19-year-old Yong Vui Kong who was convicted of drug trafficking.



Yong Vui Kong and his mother  
Picture Credit: We Believe in Second Chances

Though the constitutional challenges were unsuccessful, the cases generated significant public interest in the application of the death penalty in Singapore. Eventually, the government reformed the law in November 2012, which allowed those convicted of the death penalty for drug trafficking to escape the gallows if the Attorney-General's Chamber provides them with a Certificate of Cooperation (CoC).

As a result of the legal reforms, Yong managed to escape the gallows in April 2013. His case has also led to increased public debate about whether Singapore should continue to impose the death penalty for drug trafficking offences.

## Case Study 2: Just Compensation for Migrant Workers

Another successful example of strategic litigation is the case of **Liu Huaixi v Haniffa [2017] High Court**.

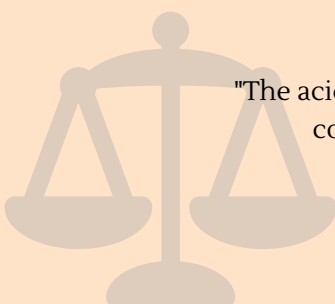
Liu was a warehouse assistant at Haniffa, a company that sold textiles and other products. He had been promised a basic monthly salary of \$1000 in the In-Principle Approval (IPA) letter he received from the Ministry of Manpower. However, he was only paid \$680 each month by his employer. He lodged a claim to the Commissioner for Labour for the shortfall in the payment of his salary.



The claimant, Mr Liu Huaixi, who claimed for underpayment of his salary from his former employer  
Picture Credit: TheOnlineCitizen

After his claim was largely dismissed by the Commissioner, he appealed to the High Court with the assistance of migrant workers' NGO, HOME Singapore, and a group of pro bono lawyers from TSMP Corporation.

Liu succeeded in his appeal. In addition, the case set a precedent for workers to be paid according to the amount stated in their IPA letters. According to HOME Singapore, many other workers have come forward with similar claims after the case was reported in the media.



"The acid test of any legal system is not the greatness or the grandeur of its ideal concepts, but whether in fact it is able to produce order and justice in the relationships between man and man and between man and the State."